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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1956

ROBERT M. NEWELL,
Petitioner,

vs.

GERTRUDE B. NEWELL,
Respondent

ROBERT M. NEWELL,
Petitioner,

vs.

THE HONORABLE D. H. SUTPHEN, as Judge of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,
Respondents

Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

W. D. EBERLE
T. H. EBERLE
J. L. EBERLE
517 Idaho Building
Boise, Idaho
Counsel for Respondents

SYMS-YORK CO., BOISE 22687

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Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

The Petition is premised upon the contention that the Idaho courts failed to give full faith and credit to an interlocutory divorce decree rendered in California (No. PASA. D-11260, hereinafter referred to as California Interlocutory Decree), and a restraining order issued by a different one of the eighty odd judges of the same court (No. 629,775, hereinafter referred to as

California Restraining Order). Said contention is without merit. The Idaho courts considered and recognized such decree as an interlocutory ex parte default decree and such restraining order for what it was under the applicable law; and petitioner submitted to and invoked the jurisdiction of the Idaho courts, sought relief for divorce, community property and custody of children and personally litigated in the Idaho courts all issues involved.

CALIFORNIA INTERLOCUTORY DECREE

(a) Incidence of Marital Status.

(1) Petitioner concedes, as he did in the Idaho courts, unless the decree is a final judgment, his petition must fail.

(2) The decree, upon its face, is not final. It specifically provides that petitioner is entitled to a divorce and that "when one year shall have expired after the entry of this interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant may be entered." (Pet. Appendix E, Page 83)

(3) Under the law applicable, the decree was not final. The Idaho courts considered and recognized the decree for what it was under such law. (Appendix A, Paragraph XI, Page 32). Section 9-101, Idaho Code, excludes foreign law as a fact to be judicially noticed. Sections 9-304, 9-307 and 9-308, Idaho Code, specifically provide for the method of proving foreign law. Appendix B, p. 43) In the absence of pleading and proof as to the laws of a sister state, it is assumed by the

Idaho courts that the same law prevails in the foreign state as prevails in Idaho. *Mason v. Pelkes*, 57 Idaho 10, 59 P. (2d) 1087, *Cole v. Cole*, 68 Idaho 561, 201 P. (2d) 98. In *Cummings v. Lowe*, 52 Idaho 1, 10 P. (2d) 1059, the Idaho court held:

> "There being no pleading or proof as to the laws of the State of Wisconsin where . . . estate was probated, as to transfer of choses in action by executors or administrators, we are bound to assume that the law of Wisconsin is the same as the law in Idaho concerning such transfers."[1]

(4) The Idaho courts had the right to apply law of Idaho in the absence of proper pleading and proof as to any different law in California; this is true even where a foreign law was stipulated.[2] Upon review, the

1—Section 9-101, Idaho Code, footnote.

"It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state, and that without allegation and evidence, it will be assumed the laws are the same as those of Idaho, and this is true even in a case where parties have stipulated that the courts might take judicial notice of the laws of another jurisdiction. Treinies v. Sunshine Min. Co., 308 U. S. 66, 84 L. Ed. 85, 60 Sup. Ct. 44, reh. den. 309 U. S. 693, 84 L. ed. 1034, 60.

2—Treinies v. Sunshine Min. Co., 308 U.S. 66, 84 L. Ed. 85. 92.

"It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state and that without allegation and evidence it will be assumed the laws are the same as those of Idaho. *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 575, 762, 111 P. 1080 47 L.R.A. (N.S.) 634; *Douglas v. Douglas*, 22 Idaho, 336, 343 125 P. 796; *Mechanics and M. Nat. Bank v. Pingree*, 40 Idaho, 118, 129, 232 P. 5; *State v. Martinez*, 43 Idaho, 180, 192, 250 P. 239; *Kleinschmidt*

court is restricted to the record as to the applicable law. *Adam v. Saenger*, 303 U. S. 59-68, 82 L. Ed. 649, 654.

(5) Although briefs of parties are not properly a part of the record on review, petitioner has included his briefs. (R. 577, 623) In the Idaho courts petitioner referred to these briefs as an exposition of the law of California and apparently such briefs are included by petitioner in the record for such purpose. They are not in compliance with the statutory provisions for proving foreign law, supra. *Moore v. Pooley*, 17 Idaho 57, 104 P. 898. Such briefs were not evidence nor was the law of California pleaded and foreign law cannot even be shown by admission or stipulation. *Mason v. Pelkes*, supra. Even where the pleading set out the sister state's statute and the reply admitted the same read as alleged, such admission was not proof that such statute was the law of a sister state. *Wilson v. Kryger*, 242 U. S. 171, 61 L. Ed. 299. In any event, regardless of the nature of the proof it was incompetent in the absence of pleading. *Cummings v. Lowe*, 52 Idaho 1, 10 P. (2d) 1059.

(6) Under the law, as properly applied by Idaho courts, the California interlocutory decree was not

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v. Scribner, 54 Idaho, 185, 189, 30 P. (2d) 362. While none of these cases involved a stipulation, the decision of the Supreme Court of Idaho (57 Idaho, 10, 59 P. (2d) 1087) declares the law of that jurisdiction. It follows from the Idaho court's refusal to look into the statutes of Washington that the jurisdiction of the Washington court was presumed to be governed by Idaho law. Under proper proof, the Idaho court would have been compelled to examine the jurisdiction of the Washington court under Washington law."

final. It was not applicable in Idaho under the provisions of Section 13-201, Idaho Code. (Appendix C, p. 45) According to Black in his Law Dictionary "interlocutory" is defined as "provisional, temporary, not final." Sup. Ct. 464. See also: Maloney v. Winston Bros. Co., 18 Idaho 740, 111 P. 1080, 47 L.R.A. (N.S.) 634; Douglas v. Douglas, 22 Idaho 336, 125 P. 796; Mechanics & Metals Nat. Bank v. Pingree, 40 Idaho 118, 232 P. 5; State v. Martinez, 43 Idaho 180, 250 P. 239; Kleinschmidt v. Scribner, 54 Idaho 185, 30 P. (2d) 362; Mason v. Pelkes, 57 Idaho 10, 59 P. (2d) 1087, cert. den. 299 U.S. 615, 81 L. ed 453, 57 Sup. Ct. 319." Not only is there no such a procedure as an interlocutory decree of divorce so far as marital status is concerned in Idaho, but specficially by statute as above mentioned, is not appealable as a final judgment (Sec. 13-201, I.C. Appendix C) and falls in the general category of interlocutory decrees which are not final. As a matter of fact, there is only one kind of a decree of divorce provided by the law of Idaho and that is for absolute divorce. (Sec. 32-601 L.C. Appendix J, p. 67) The Idaho courts have held that even a decree from bed and board cannot be granted and is a nullity. *Radermacher v. Radermacher*, 61 Idaho 261, 100 P. (2d) 955.

(7) There was no finding in the California proceeding that respondent, Gertrude B. Newell, appeared. The reference to such appearance in the findings and in the decree is a mere recital. (Pet. Appendix E, Pages 78-83) The statement of petitioner to the contrary is incorrect.

(8) Idaho courts in exercising their right to inquire into the jurisdiction of a court of a sister state may inquire into the facts necessary to give such jurisdiction, and recitals can always be questioned. *Thompson v. Whitman*, 18 Wall., 463 (85 U.S., XXI, 897), and cases cited in the opinion of the court; *Knowles v. Gaslight Co.*, 19 Wall., 59 (86 U.S. XXII, 71); *Starbuck v. Murray*, 5 Wend., 148, per Marcy, J.; *Rape v. Heaton*, 9 Wis., 328; *Kerr v. Kerr*, 41 N.Y., 272; *Sumway v. Stillman*, 6 Wend., 453; *Noyes v. Butler*, 6 Barb., 613; *Norwood v. Cobb*, 24 Tex., 551; *Carleton v. Bickford*, 13 Gray (Mass.), 591.

Quoting from Justice Brewer of the Supreme Court of the United States, in *Brown v. Fletcher's Estate*, 52 L. ed. 966, at 970:

> "Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts."

See also *Mason v. Pelkes*, supra.

(9) Petitioner failed to include in his appendices the findings of fact and conclusions of law of the trial court in Idaho and we have, therefore, set the same forth in Appendix A hereto. In such appendix, Paragraph XI, Page 32, the court found that respondent Newell did not appear in the California court; that the recitals as to appearance are untrue; that her letter to one of the eighty judges in the California court was placed "in the file by a person unknown"; that petitioner moved to strike the letter from the file and

the matter was then heard by another judge as a default; that no filing fees were paid; that respondent was a resident of Idaho and did not appear in the California proceeding. In Idaho a letter or a telegram to a Judge is not an appearance. In *Newell v. Newell*, 293 P. (2d) 663, 668 the court said:

> "Respondent's letter did not constitute a personal appearance in appellant's California divorce action, and the trial court properly so held. Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E. (2d) 343; In re Kimball's Estate, 155 N.Y. 62, 49 N.E. 331; Fortier v. Gumelsky, 148 La. 768, 87 So. 741."

In *Rutherford v. Bentz*, 104 N.E. (2d) 243, (Ill. 1952), the Court said:

> "The plaintiffs contend that the telegram sent by the defendant Bentz to the Circuit Court Judge of Champaign County was a general appearance. We do not think so. We agree with the law announced in Feltenstein v. Stein, 51 Ill., App. 426, where it is said that the judge is not the court. The court is a legal entity, created by the Constitution and the judge is the presiding officer only. Under our system, there are three judges of a Circuit Court. Each of these judges when he presides, holds Court. A telegram to either of these judges or a letter while addressed to the judge, as the judge of the Circuit Court of Champaign County, is to the individual and not the Court."

In other words, in the Illinois case, there were only three judges and the court held that his letter to a judge was not a communication to his court. In the case at bar, there were some eighty odd judges, making it even more incredible that anyone should contend that such a letter was an appearance.

Another case is the consideration by a New York Court of a North Dakota divorce decree where absent husband's appearance was based upon a letter filed as an answer. *In re Kimball's Estate*, 49 N.E. 331, 155 N.Y. 62. New York, taking judicial notice under its law of foreign laws, discusses whether this was an answer or an appearance. It found the paper made in New York, not subscribed properly or headed properly in the Court, not acknowledged as required, and not purporting to be a pleading, was not an appearance. It therefore found that jurisdiction of the North Dakota Court to be lacking and its judgment void and of no effect in New York, even though the North Dakota Court found it to be an appearance. An illustrative case is that of *Fortier v. Gumelsky*, 87 So. 741, 150 La. 203, 1921. The Court stated the facts as follows:

> "Counsel for Fortier wrote to the judge, complaining that the time thus fixed was too short — indeed, was in violation of the rules of the court, owing to intervening holidays — and asking for a continuance. The judge paid no attention to this letter, but proceeded to try the case at the time fixed, and to render judgment dissolving the injunction. This he did in absence of Fortier and his

> attorney, but after they had been duly called at the door of the courthouse, as customary in the respondent judge's court."

Later application was made for writs of certiorari mandamus, and prohibition. The Court denied the same on the ground that there could have been no error, because the letter could not take the place of an appearance, saying:

> "This is not such a case, and could not be even if there had been error, and there was none, since a letter cannot be made to take the place of a regular appearance in court, and since the time fixed for the return was not in violation of any rule of court."

(10) If the California law were different from that of Idaho the same was neither pleaded nor proved as to such alleged appearance. In any event, it only pertained to an order to show cause and the letter to the Judge stated that respondent had no funds and no funds were available for her to appear. Any attempt to foreclose her by holding the same to be an appearance and a decree based thereon would be void, because of lack of due process — an unconscionable order. There would have been an abuse of process or a flagrant departure from ordinary judicial procedure, and even if the judgment were final it would not be entitled to full faith and credit. *Andrews v. Andrews*, 188 U.S. 14, 47 L. ed. 366; *Roth v. Roth*, 104 Ill. 35, 44 Am. M. 81.

(11) Petitioner infers that subsequent proceedings

by respondent in California were inconsistent with the decree of divorce in Idaho. Both parties remarried. The Idaho courts found that respondent was a resident and domiciled in Idaho. She was in Idaho some eighteen months. The court found that she and her children had become a part of the community in Idaho, and participated in Community affairs in good faith. (Appendix A, Page 36): she not only established a home, but sent her children to school and it was not until some eighteen months later that she went to Paris, France and was remarried. Petitioner was remarried and lived in California. Respondent's husband was in business in California and she then went with him together with the children. Immediately upon going to California respondent filed her petition in January, 1955 in the Superior Court of the State of California, in and for the County of Los Angeles, setting forth the Idaho decree and praying "the said judgment be established as a valid judgment and that the same be enforced in this action in the manner provided by law": (Appendix D, p. 46) at the same time petitions moved to modify the California interlocutory decree accordingly, setting forth the Idaho decree. (Pet. Appendix I, Page 98). Pending the determination of such action to establish the Idaho decree, the California court entered its temporary order providing for custody of the children and requiring petitioner to support the same. (Appendix E, p. 51). It will be noted in said order that the motion to modify the interlocutory decree in accordance with the Idaho decree were consolidated for hearing and the court thereupon issued an identical

temporary order. Such proceedings were consistent with reliance upon the Idaho decree and for the purpose of establishing the same in California. Petitioner came to Idaho and personally submitted himself to and invoked the jurisdiction of Idaho courts for the trial and full determination of all issues between the parties. Where successive and conflicting judgments in different proceedings between the same parties upon the same issues are had, the last judgment rendered is conclusive. *2 Freeman on Judgments, 5th Ed., Sec. 629, p. 1326; 15 Cal. Jur. Sec. 143, p. 57; 7 Cal. Jur. 10 Yr. Supp. p. 359; California Bank v. Traeger, 10 P. (2d) 51, 215 Cal. 351; Maloney v. Mass. Bonding, 123 P. (2d) 449, 20 C. (2d) 1.* Petitioner, in his pleading to respondent's complaint for divorce, made allegations entitling him, if proved, to a divorce and custody of the children and offered proof with reference thereto at the trial. The

3—"That during the course of the marriage of the parties hereto, the plaintiff has been guilty of extreme cruelty towards this defendant in that she has wrongfully inflicted upon him grievous mental suffering, pain and distress; in particular, that for approximately two years immediately last past, the plaintiff has been carrying on an illicit and clandestine romance with the aforementioned Walter W. Ralphs, Jr., and has continuously lied and misrepresented to this defendant her goings and comings and whereabouts during the day in an attempt to conceal from this defendant her aforementioned illicit relationship, and has treated this defendant in a cold and indifferent manner without justification, provocation or escuse.

That this plaintiff has continuously neglected the children of the parties hereto over a period of the last two years, while she was carrying on this illicit and clandestine romance with the said Walter W. Ralphs, Jr., continuously and practically

California court in California Bank v. Traeger, supra, held:

> "Moreover, the effect of said judgment operating as an estoppel of any claim of . . . Danziger to the property involved in that suit as against any of the defendants herein named, and determining the title to said property as between herself and said defendants, forecloses . . . Danziger from effectively setting up as res judicata the prior judgment secured by the Wake Development Company in the suit to quiet title instituted by it against defendants Danziger, O'Leary and Traeger. The judgment relied upon by appellant is the last judgment in point of time and controls and determines the rights of the parties herein.

daily leaving the home of the parties hereto at approximately 11:00 A.M. and not returning on many occasions until 8:00 P.M.; all of which was without the knowledge of this defendant.

That this defendant has repeatedly tried to get this plaintiff to affiliate with the church, he being associated with the Presbyterian Church, and this plaintiff has continuously and persistently refused to go with said children to Sunday School or to go with this defendant to either Sunday School or church and the entire religious obligation of the parties hereto towards said children has been with this defendant and this defendant has seen to it and taken these children to the Presbyterian Sunday School so that their religious training could not be and would not be neglected.

That the plaintiff herein is not a fit and proper person to have the care, control or management of said children because of the acts and conducts of the plaintiff as herein above alleged; that this defendant is a fit and proper person to have the care, control and custody of said children, and it is in the best interests of said children that he be awarded their care, control and custody."

(cases cited) 'Rights acquired by virtue of a judgment or decree are liable to be terminated in the same manner. Consequently though a matter has once been litigated to a final judgment if it is subsequently relitigated and adjudicated, the last judgment controls and determines the rights of the parties.' Freeman On Judgments (5th Ed.) vol. 2, sec. 629, p. 1326. The rule in such cases is, that the last judgment concludes."

Williams v. No. Carolina, 317 U.S. 287-324, 87 L. Ed., p. 279.

(12) Petitioner argues that by virtue of some peculiar law in California the California interlocutory decree is a final judgment as to marital status. As heretofore pointed out such law was neither pleaded nor proved and, therefore, is immaterial; nevertheless we should call the court's attention to the fact that the case of *Leupe v. Leupe*, 21 Cal. (2d) 145, 130 P. (2d) 697 (Petitioner's Brief Page 28), cited by petitioner, involved an interlocutory decree from which no appeal had been taken within the statutory period and hence review had to be denied. However, it will be noted that so far as the marital status is concerned the court did not overrule, but specifically pointed out, the following cases supporting reference to the lack of severance of marital relations.

"In re Dargie's Estate, 162 Cal. 51, 121 P. 320, and In re Seiler's Estate, 164 Cal. 181, 128 P 334, Ann. Cas. 1914B, 1093."

Referring now to In re Dargie's Estate, supra, and with reference to the wording of the decree heretofore noted, that the decree did not become final until final judgment was entered, the California court said:

> "No final judgment was ever pronounced or entered in the case."
>
> "Clearly there is here contemplated and required further judicial action as a condition precedent to the making and entry of the final judgment. The language is that the 'entry' of the final judgment is to be by 'the court'. This shows that the word 'entry' is not used to describe the mere clerical act by the clerk of writing such judgment in the judgment book, but that it was employed to describe and include the action of the court in rendering or pronouncing the final judgment.* * * The statute at least requires that the court shall again act in the case by declaring the final judgment. Unless it so acts, there is no authority for the entry of any final judgment."

It will be noted that petitioner argues that as to marital status, the interlocutory decree is final in all particulars excepting that the parties are proscribed from remarrying for a period of one year. This is not only contrary to the decisions of the California court above mentioned, but in the case of Seiler's Estate, supra, the California court specifically said:

> "By the terms of the statute it is the final judgment alone that grants the divorce, dissolves the

> marriage, restores the parties to the status of single persons and permits each to marry again. Until the court has by final judgment declared the marriage dissolved, the parties remain in the legal relation of husband and wife * * * it follows that, under the rule declared in the Dargie Case, the appellant was the surviving husband of the decedent, and as such entitled to letters."

With reference to the incidence of community property referred to in the case of *Leupe v. Leupe*, supra, we shall discuss the same under the heading of Incidence of Community Property.

(b) Incidence of Community Property

(1) The only property involved in Idaho was a Buick station wagon, which was in Idaho at all times and never in California during any period involved in the California proceedings. As to such station wagon, petitioner personally appeared before the trial court in Idaho and submitted himself to its jurisdiction regardless of any action or proceedings in California or otherwise. The station wagon was in the jurisdiction of the Idaho court, the parties had submitted themselves to its jurisdiction and the order made was simply pending final determination. The application shows that petitioner stated to the trial court, "the car, I would want it to still be subject to the jurisdiction of this court." (Reporter's Transcript 193, Page 329) The order of contempt sets forth all of the facts quite fully. (Appendix F, p. 55) Petitioner specifically and

personally stated in open court that all he wanted to do was *use* the Buick station wagon.

> "All I want to do is to use it during the windup of this affair, unless the Court follows the judgment and awards it to me exclusively. I need it in my business particularly because there is no public transportation from where I live." (R. 193, Tr. 329-330).

He did not wish the title, but only the use pending final determination. In his application he said,

> "*and the car I would want it to still be subject to the jurisdiction of this court, the rights in the car, whether the court follows the California judgment or not. I have generally appeared in Idaho, the car will be before the court to decide." (R. 193, Tr. 9).

The order of contempt then shows that having upon his application obtained the use of the Buick station wagon pending litigation, petitioner took the station wagon to California, "deceived the court" in mortgaging the car there and then selling the same in California, in violation and in defiance of the order which he personally sought from the court. (Appendix F, p. 56) Not only was the car never within the jurisdiction of the California court during the proceedings there, but the order made was only temporary upon the application of petitioner and upon his specific statement that it would be subject to the jurisdiction of the Idaho court.

(2) Here again petitioner argues California law as above noted. None was pleaded or proved. However, even in the case of Leupe v. Leupe, supra, the court reserved judgment upon the problems of disposition of property where there is a reconciliation before a final decree and in the subsequent case the court held:

> "It would appear that the proper solution of this problem would be to hold that the interlocutory decree may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree. A reconciliation before that time or the death of one of the parties, and perhaps other circumstances, would prevent the condition title from becoming absolute." Wilson v. Wilson, 172 P. (2d) 568, Cal. App. 2d (1946).
>
> ". . . portions of the interlocutory decree purporting to make an immediate disposition of property are erroneous . . ." Gudelj v. Gudelj, 259 P. (2d) 656, Cal. 2d (1953); Forbes v. Forbes, 257 P. (2d) 723, Cal. App. 2d (1953).

(c) Incidence of Custody of Children

(1) The children involved were in Idaho prior to and during the proceedings which were had in California. Petitioner again argues peculiar California law which was neither pleaded nor proved. Hence, the Idaho courts applied Idaho law and in Idaho the question of custody is controlled by fitness of a party at the time of hearing. In *Moss v. Vest*, 74 Idaho 328, 262 P. (2d) 116, (1953), the Supreme Court said:

> "Whether the petitioner as mother of the child is the proper person to have the custody is controlled by a determination of her fitness at the time of the hearing as it relates to the welfare of the child. Newman v. Newman, 109 Cal. App (2d) 359, 240 P. (2d) 682; Sorrels v. Sorrels, 105 Cal. (2d) 465, 234 P. (2d) 103."

As to the effect of a foreign order of custody, the Court has also disposed of the question in the case of *Cole v. Cole*, 68 Idaho 561, 201 P. (2d) 98, where it said:

> "Where custody of the children is fixed by a decree of divorce, domicile of the children is an additional consideration affecting jurisdiction. In Duryea v. Duryea, supra, this court held that a court is without right in a divorce suit to award custody of the children of the parties then domiciled in another state and that in a subsequent controversy the same parties in the state of the children's domicile, the decree would be accorded no extraterritorial effect; that all questions affecting the right to custody would be investigated anew despite the appearance of the parties in the former suit and the litigation by them of their respective claims to custody."

It will be noted that in the last case cited there was personal jurisdiction in a sister state. The Idaho court nevertheless held:

> "*decree is a conclusive adjudication of all questions affecting the right to custody to its date. It is not an adjudication in futuro, it is conclusive only to its date."

In any event, the whole matter involved in conflicting decrees with reference to the incidence affecting children has recently been determined by the Supreme Court of the United States. In the case of *May v. Anderson*, 345 U.S. 528, 97 L. ed. 1221, the parties were domiciled in Wisconsin, and it was agreed that the wife should take the children to a place in Ohio and think over her future course. When she did not return, the husband obtained an exparte decree in Wisconsin, awarding him the children. Pursuant to this decree, the husband obtained the children, who remained with him in Wisconsin until he permitted them to visit their mother in Ohio. Inasmuch as the husband had permitted the children to go to Ohio to visit their mother only temporarily, he filed proceedings in Ohio to obtain the children, based upon the decree in Wisconsin. The Supreme Court of the United States held that even though the husband had custody of the children in Wisconsin and only temporarily permitted them to go Ohio to visit their mother, nevertheless the right to custody was the personal right of the mother and could not be cut off by a default decree and that such decree was not entitled to full faith and credit, *regardless of whether or not the children were technically domiciled in Wisconsin.*

As illustrative of what we mean by the dignity of

precise analysis, the Supreme Court of the United States clearly makes divisible the several incidences of a divorce decree. In the case of *Estin v. Estin*, 334 U.S. 541, 92 L. ed. 1561, the Supreme Court of the United States clearly held that although the requirements of full faith and credit are exacting, this does not mean that because one state can by a decree change the legal incidence of the marriage relationship, it may also change the instance of alimony. In other words, the Supreme Court makes the decree divisible and only gave full faith and credit effect to a Nevada decree insofar as it affected the marital status, but made it ineffective so far as the issue of alimony was concerned.

In the case of *May v. Anderson*, supra, the Supreme Court of the United States follows the same analysis and reasoning, holding that while recognizing the Wisconsin divorce as to the incidence of the marriage status, nevertheless, "in the instant case, we recognize that a mother's right to custody of her children is a personal right, entitled to at least as much protection as her right to alimony."

Referring to an argument similar to that of petitioner Newell as to domocile, the Supreme Court again settled this question for all purposes by saying:

> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary

> to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive the mother of her personal right to their immediate possession."

(2) As heretofore noted, petitioner made an issue as to the custody of the children in the Idaho courts. He pleaded his fitness and alleged the unfitness of respondent. (R. 193, Tr. 246-247) He offered proof when he was on the witness stand as to his fitness. (R. 193, Tr. 175) He submitted himself to the jurisdiction of the trial court as to custody. (R. 193, Tr. 202).

(3) Although, as hereinbefore noted, no California law was pleaded or proved, in view of petitioner's statement as to California law, we call the court's attention that California also holds that technical domicile of children does not provide jurisdiction. 9 Cal. Jur. 130, p. 786. In the case of *Ex parte Brown*, 203 P, (2d) 799, 90 C A2d 65, the California court held:

> "The Nevada decree, of course, was not final with respect to the matter of custody. It was subject to modification either by the Nevada courts or the courts of California. However, the decree of a foreign state with respect to custody will be respected by a California court, and will be superseded by a contrary award of custody only upon the ground of changed circumstances."

CALIFORNIA RESTRAINING ORDER

(1) Petitioner, desiring to take the depositions of certain witnesses residing in California, applied to the California court for the issuance of subpœnas stating under oath that the testimony of such witnesses was material to the issues in the Idaho divorce case pertaining to (a) alleged misconduct of respondent, (b) custody of minor children, and (c) alleged cruelty by respondent to petitioner. In the affidavit of petitioner setting forth such reasons, petitioner set out the Idaho statutory provisions. (Appendix G, p. 60). The California provisions are similar. (R. 193, Tr. 202) Whereupon, respondent made a similar application for the issuance of subpœnas to take the deposition of certain witnesses residing in California. In such proceeding petitioner reversed his position again under oath, alleging that there are no such issues in the Idaho divorce court, which he had stated under oath existed, and moved to quash the subpœnes, to restrain respondent from taking such depositions and also to restrain her from taking any proceedings with reference to divorce, property or custody of children anywhere in the world.

(2) Such proceedings were special and statutory. The court had no jurisdiction to exercise general equity powers to restrain respondent as above mentioned. The special statutory proceedings were simply to issue the subpœnas or deny the same. Respondent proved the California law and the pleadings were amended to conform thereto. It was testified that the proceedings for issuance of subpœnas was a special statutory pro-

ceedings similar to Idaho. (R. 193, Tr. 202) It was testified that the court had no power to go beyond the petition for subpœnas; it had no equity juprisdiction. It could not go beyond the issuance or denial of the subpœna. (R. 193, Tr. 202-203) In *1 Cal. Jur. (2d), p. 635*, the rule is laid down as follows:

> "Special proceedings established by statute must strictly follow the statute, and a court setting therein has no general or equitable jurisdiction."

In the disposition of petitioner's application, the California court made the following minute entry: (Appendix I, p. 66).

> "After oral argument, the motion of defendant to quash subpœna and subpœna duces tecum is granted, and plaintiff is restrained from taking depositions in this county to be used in the Idaho proceedings."

Such minute entry was clearly within the special proceeding issue as to whether the subpœnas should be issued or quashed. As shown by the findings of fact (Appendix A), petitioner in spite and in disregard of such minute entry prepared and had signed by one of the eighty judges the order now referred to as the California Restraining Order. It was not in accordance with the minute entry and cannot extend the same. In the case of Nealis v. Carlson, 219 P. 2d) 56, 98 C A (2d) 65, the California court said:

> "* where * no reference is made in the minute

> order for the preparation of a formal order, the only appealable order is the minute order, and the formal order later filed is functus officio."

In the case of Pessarra v. Pessarra, 183 P. (2d) 279, 80 C A (2d) 965; the Court of California also said:

> "That the court had no power to change or modify that order (minute entry) in the manner attempted by the order of April 4, 1947; that the order of April 4 was totally void and the appeal therefrom abortive;"

(3) Moreover without notice to respondent and without the filing or serving of any findings or conclusions, petitioner obtained said restraining order. Respondent had no notice or information with reference thereto until a few days before trial. (R. 193, Tr. 197) There was no service of any notice, findings or conclusions. (R. 193, Tr. 197) Again respondent introduced the California law. First, reference was made to the code provisions. (R. 193, Tr. 199, 200) In a final judgment as contended by petitioner, findings and conclusions were required. Rule 19 G of California Court was introduced requiring service and filing of such findings and conclusions (R. 193, Tr. 199) Then it was testified that under the California law a judgment without findings of fact and conclusions of law is a nullity. (R. 193, Tr. 200). Respondent's witness gave the citations and cases sustaining such opinion. The witness testified that under the rule in California, the court had no jurisdiction to enter the

order. (R. 193, Tr. 202). In the case cited by the witness, *Kaliterna v. Wright*, 212 P. (2d) 32, 36, the court said:

> "On January 5, 1948, the court signed findings of fact and conclusions of law. For some reason they were not filed before the judgment was signed and filed. This was on January 8. Thereafter, on July 2, pursuant to motion and after argument, the court ordered the findings and conclusions to be filed nunc pro tunc as of January 5. We have recently held that, where findings are required and are not waived, a judgment without findings is a nullity."

Petitioner questions the testimony of the lawyer witness upon the ground that he was a relative. Manifestly, this is a question of weight of the evidence and not a federal question. The California court had no general equity power in this special proceeding. The order could not change the minute entry and with no notice, findings of fact or conclusions of law, the order was a nullity.

(4) Petitioner points out that an appeal had not been taken by respondent from such restraining order. The Supreme Court of California has rendered its decision upon such appeal and held that respondent had received an Idaho decree of divorce which was affirmed by the Supreme Court of Idaho and hence the provisions of the restraining order are no longer at issue. It also held that the orders for custody in the action brought by respondent to establish the Idaho decree in Cali-

fornia and motion for modification superseded previous orders. (Appendix H)

(5) It is not clear as to just what affect petitioner attributes to the California restraining order upon respondent's application for subpœnas to take depositions; he apparently views the order as final but concludes that it was only in personam and that in comity and discretion the Idaho courts should have restrained respondent. The discretion of the trial court in considering the restraining order as one in personam was sustained by the Supreme Court of Idaho, saying that to restrain respondent pending the appeal from the California restraining order went to the sound discretion of the court and that "no abuse of that discretion appears, particularly in view of the invalidity of such restraining order." Moreover, so far as exercising discretion in granting of stay, it has been unanimously held that if the jurisdiction is even doubtful, the motion should not be granted, *St. Johns v. Putnam*, 220 N.Y.S., 141, 128 Misc. 714, and in any event, an order restraining a party from going to another state to try a matter is not entitled to full faith and credit where it is not on the merits. *Hock vs. Bryam*, 230 N.W. 823 (Minn.); *Iowa-wire Bridge Co. vs. Phoenix Finance Corp.* 25 A. 2d 383 (Del.), Cert. Denied, 317 U.S. 671, 87 L. ed. 539.

(6) Petitioner was in court during the entire trial. Testified as a witness, but did not testify as to the law of California, although he was a practicing attorney in California, and did not attempt to refute the testimony of respondent's witness as to the law of Califor-

nia to the effect that such restraining order was a nullity in California.

(7) We have already discussed under California Interlocutory Decree the question of the custody of children and under the rule and cases there cited the restraining order could have no affect so far as the custody of the children was concerned in the State of Idaho. The Idaho court on August 22, 1953 restrained petitioner from taking any action interfering with the custody and care by respondent of the children. (R. 193, Tr. 228) The court found that in violation of such order, petitioner obtained the restraining order in California. (Appendix A, Paragraph 11) While so restrained by the Idaho court, petitioner obtained said California restraining order purporting to restrain respondent from taking any action or proceedings with reference to the custody and care of the children in Idaho in direct violation of the restraining order theretofore issued by the Idaho court protecting respondent in the care and custody of such children and then proceeded to ask the Idaho court to recognize the later restraining order as a matter of comity and sound discretion!

Accordingly the petition for Writs of Certiorari should be denied.

Respectfully submitted,

W. D. EBERLE,
T. H. EBERLE,
J. L. EBERLE.

APPENDIX

Appendix A

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL, *Plaintiff,* vs. ROBERT M. NEWELL, *Defendant.*	Findings of Fact and Conclusions of Law

This cause came on regularly to be heard before the Court, without a jury, on July 12, 1954, the defendant, Robert M. Newell being personally present in court during the trial, and also represented by his counsel, John A. Carver Jr., and the plaintiff, Gertrude B. Newell being also personally present in court, and represented by her counsel, J. L. Eberle and T. H. Eberle, and witnesses having been sworn and examined and documentary proof offered, said cause having been submitted for consideration and decision, and the Court having duly considered the law and the evidence, renders the following Findings of Fact and Conclusions of Law; and hereby finds the facts to be as follows:

FINDINGS OF FACT

I

That plaintiff herein, Gertrude B. Newell and de-

fendant herein, Robert M. Newell intermarried in Pasadena, State of California on or about November 1, 1942, and ever since have been husband and wife.

II

That said plaintiff now is and for more than six weeks immediately preceding the commencement of this action, which was filed August 22, 1953, has been a resident of and domiciled in the State of Idaho; said plaintiff expressed to her close friends and family in May and June 1953 her intent to permanently leave the State of California, to escape defendant's conduct toward her, and actually abandoned her home and residence in California in June 1953 and came to Idaho where she and her family had been well known for many years and had many friends, and on or before July 10, 1953 established her residence in Idaho, away from the oppresive and injurious conduct of defendant and has maintained since then a healthy and peaceful home for herself and children in Idaho; said plaintiff and said children at all times since the establishment of such residence have been and now are within the jurisdiction of this Court.

III

That as issue of the aforesaid marriage there have been born to plaintiff and defendant three children, namely, Robert M. Newell, Christine Lindsey Newell and William Charles Newell, all minors; that said children left California with plaintiff in June 1953 and came to Idaho as hereinbefore set forth, and at all

times since have enjoyed the love, care and affection of said plaintiff and are now enjoying the love, care and affection of said plaintiff, and in her custody residing and domiciled in the residence of said plaintiff in Idaho.

IV

That said plaintiff is a fit and proper person to have and be awarded the custody, care, education and control of said minor children, and the best interests of said minor children require that they be kept in the custody of said plaintiff, subject to reasonable rights of visitation of said children by said defendant, at such time or times and at such place or places as plaintiff may determine to be for the best interests and welfare of said children, but not oftener than once each month, upon giving to plaintiff at least 24 hours notice in advance of any time said defendant desires to exercise such right of visitation.

V

That since their marriage said defendant has treated plaintiff, without cause, excuse or justification, with extreme mental and physical cruelty, and his conduct has impaired plaintiff's health and caused grievous mental suffering, making it impossible for plaintiff to continue her marital relations with defendant; that as a result of said conduct plaintiff left and separated from said defendant on or about July 1, 1953 and did so with justification and established her own and separate residence in the State of Idaho as hereinbefore set forth; and upon the facts presented to the Court it

would be fair and proper to award all of the community property within the Court's jurisdiction to said plaintiff who is the innocent party to this cause.

VI

That the only community property within the jurisdiction of this Court is the community interest of the parties hereto in one Buick Station Wagon, certain possessory rights of which were granted to defendant, by order made herein on January 15, 1953; that such community property interest is determined to be of the value of $825.00, which should be awarded to the plaintiff and defendant should be directed to pay the same to plaintiff; and in the event said Buick Station Wagon is returned to the jurisdiction of this Court by defendant, the same should be impressed with a lien in said sum in favor of plaintiff.

VII

That defendant personally appeared in the above Court and cause and subjected himself to its jurisdiction.

VIII

That defendant is an able bodied man, an attorney at law and capable of supporting himself and said minor children, with an income of about $10,000.00 per year, and defendant should be required to pay for the support of said minor children, and the sum of $75.00 per month for each child, during minority or until further order of this Court, is hereby fixed as a proper amount for the support of said children, and defendant should be required to pay the same as follows:

$225.00 for the month of July,
$225.00 for the month of August
$225.00 for the month of September

should be paid on or before September 16, 1954, and thereafter said defendant shall pay $75.00 per month for each of said children, as above specified, on the 1st day of each and every month commencing October 1, 1954.

IX

That the Court finds that $500.00 is a reasonable additional amount to allow plaintiff for counsel fees, and the sum of $43.65 as special costs, in addition to statutory cost bill that may be filed upon entering of decree.

X

That in order to protect the physical and economic well being of plaintiff and the minor children, the defendant should be restrained from molesting or interfering with them.

XI

That the Court has considered the interlocutory decree of divorce made and entered in the Superior Court of the State of California in and for the County of Los Angeles known as Pasa-D-11260 on or about September 25, 1953, and recognizes the same as, and finds that it is, an interlocutory, ex parte, default decree of divorce; that said interlocutory decree was entered upon default in a proceeding where process was served on the plaintiff herein in Idaho and in which she did not appear or participate in any manner; that the recitals in said de-

cree to the effect that the plaintiff herein appeared are untrue and the Court finds the facts to be that defendant herein well knowing that plaintiff had separated from him, and the reasons therefor, and had come to Idaho and established residence, endeavored to acquire an advantage by filing a proceeding for divorce in California a few days before plaintiff filed the above entitled cause; that in connection with an order to show cause relating to the custody of the children, which were in Idaho, the plaintiff herein wrote a letter to the Honorable Allan T. Lynch, one of the eighty judges of said Los Angeles County Superior Court, which letter among other things stated that she had no funds to come to California in connection with said custody order to show cause; how said letter came to be placed in the file of said proceeding does not appear, although presumably it was by said judge; that the defendant herein being a lawyer and a member of the Bar of the State of California moved to strike the letter from the files and the same was ordered stricken; that the matter was then heard by another judge as a default, and the interlocutory decree of divorce above mentioned entered; that the papers including the recital above mentioned were prepared by the defendant herein; that said letter was written by plaintiff herein without the knowledge of her counsel; that said plaintiff herein was a resident of Idaho and not of California and service was made upon her in Idaho and not in California; that said letter was not filed by plaintiff herein, no filing fees were paid and said plaintiff herein did not appear in said California proceeding, nor was said

letter an appearance; that were this Court to accept said recital of appearance based upon said letter, no funds having been sent to plaintiff to appear and no action taken to protect her, or an opportunity to appear after being notified that the wife was caring for the children and was without funds, the same would be without due process and in violation of the requirements of due process of law; that the defendant herein has appeared generally in this Court, has fully participated and has received full opportunity to be heard by this Court; that said decree is interlocutory, ex parte and not final; that at the time of preparing and obtaining said decree said defendant well knew that the above entitled Court on August 26, 1953 had restrained him from interfering with the care and custody by plaintiff of said minor children and well knew that the said children were in the care and custody of plaintiff in Idaho; that defendant nevertheless prepared said California decree with provisions granting custody of said children to himself, and also community property in Idaho in the form of a Buick Station Wagon; that said California court had no extraterritorial jurisdiction over the custody of said children or said Buick Station Wagon.

XII

The Court has recognized and given consideration to that certain restraining order issued by the Superior Court of the State of California in and for the County of Los Angeles in case No. 629775, and the Court finds the facts to be as follows:

That said defendant first served notice upon said

plaintiff as required by the law of Idaho for the taking of the depositions of certain witnesses in California whose testimony was material to the issues in this cause; that thereupon the defendant herein filed a special proceeding in the State of California, being case No. 92495 for the issuance of subpœnas in connection with the taking of such depositions; that in such special proceeding defendant made an affidavit to the effect that it was necessary to obtain such subpœnas because the testimony of certain witnesses was material to the issues of divorce, custody of the children, cruelty of defendant, title to personal property and adultery; that plaintiff herein also desiring to take depositions of witnesses whose testimony was to be used in the above entitled cause made a similar application under the special proceeding providing for the issuance of subpœnas in connection with such depositions, said case being No. 629775, and in such cause the defendant herein filed an affidavit within one week after the first affidavit above mentioned, and set forth under oath that there were no issues in the above entitled cause, and therefore the issuance of subpœnas should be denied and also in the same proceeding had an order to show cause issued why plaintiff should not be restrained from proceeding with the above entitled cause in Idaho; that the Court made an order by minute entry to the effect that the issuance of subpœnas was denied, but a few days later defendant prepared and had signed an order beyond the issues in such special proceeding providing for the restraint of plaintiff from proceeding with the above entitled action in Idaho; that defendant

gave no notice of such order to anyone and no Findings of Fact and Conclusions of Law or bond were filed; that such proceedings were statutory and the Court had no general or equitable jurisdiction to issue any restraining order; that defendant does not contend that such order is res adjudicate, but that it is a final order. Inasmuch as no Findings of Fact and Conclusions of Law were prepared or filed, no notice given and the order was not within the special proceedings or pleadings, said order is a nullity and not binding upon this Court.

XIII

That plaintiff and her children since their arrival in Idaho have lived and made their home in Idaho for some 13 months and have become a part of the community in Boise, making a home there and have taken steps to be known as residents of Idaho, participating in its community affairs, all of which actions were taken in good faith and with the intent of making Idaho their permanent home.

XIV

Excepting as otherwise hereinbefore specifically set forth all of the allegations of the pleadings of plaintiff are true and none of the allegations or denials or defenses of the pleadings of the defendant are true and all of the facts upon which the defenses and pleadings of defendant are predicated are untrue, excepting as hereinbefore specifically set forth, all evidence and testimony supplied by defendant contrary to the facts hereinbefore set forth is untrue or contrary to the reasonable inferences to be drawn.

As Conclusions of Law from the foregoing Findings of Fact, the Court hereby finds and decides.

CONCLUSIONS OF LAW

I

The moving from one place of residence to another with intent to abandon the old residence and establish a residence in the new place is in law a change of residence which may be accomplished in one day; plaintiff abandoned her residence in the State of California in the month of June, 1953, came to Idaho and established her residence in the State of Idaho on or before July 10, 1953, and at all times since has been and now is a resident of and domiciled in the State of Idaho.

II

Upon the duly authenticated record of the proceeding in the California Court, Pasa-D-11260 introduced in evidence, this Court must presume the validity of the same and the burden of proving any invalidity was on plaintiff; and to the extent hereafter set forth plaintiff has sustained that burden by clear and convincing evidence.

III

This Court does not take judicial notice of the laws of another State and without evidence it will be assumed the laws are the same as those of Idaho.

IV

No interlocutory decree or judgment in Idaho is

appealable excepting an interlocutory judgment in an action for partition of real property.

V

An interlocutory decree is not final.

VI

The Court may inquire into the jurisdiction of the Court in which the foreign judgment was given to pronounce it or the right of the State itself to exercise authority over the person or the subject matter.

VII

Recitals in findings, conclusions, judgments or decrees can always be questioned and even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts.

VIII

The Court is a legal entity and the judge is the presiding officer only. Where there are more than one judge if he holds court, he presides. A letter to any of such judges, while addressed to the judge is to the individual, and not the Court.

IX

A letter to a judge of the Court cannot be made to take the place of a legal appearance in Court.

X

Where a letter is written by a litigant to one of eighty judges of a Court, no filing fees being paid, and counsel for such litigant having no knowledge that

such letter was written, and the litigant makes no other appearance, by person or otherwise, and such letter is placed in the file of the proceeding, presumably by the judge to whom it was written, such letter does not constitute a personal appearance.

XI

The Court may always inquire as to whether the Court entering a judgment in a sister State had jurisdiction of the subject matter and of the person, and whether the same was substantially responsive to the issue tendered by the pleading.

XII

Under the law of California the proceeding for the issuance of subpœnas in connection with the taking of deposition in a special proceeding established by statute and the same must strictly follow the statute and a Court sitting therein has no general or equitable jurisdiction.

XIII

Where application was made in a special proceeding in the State of California for the issuance of subpœnas, an order denying the same which included an injunction and restraining order in the exercise of equity jurisdiction, without notice of the filing of such order and without Findings of Fact and Conclusions of Law was without jurisdiction and a nullity under the law of California.

XIV

Under the law of California a final decree or order

without Findings of Fact and Conclusions of Law, unless waived, and filed without notice is a nullity.

XV

Whether a mother is a proper person to have custody is controlled by determination of her fitness at the time of the hearing as it relates to the welfare of the child.

XVI

A Court is without right in a divorce suit to award custody of the children of the parties then domiciled in another State; and in the subsequent controversy between the same parties in the State of the children's domicile the decree would be accorded no extraterritorial effect.

XVII

A mother's right to custody of her children is a personal right which cannot be cut off by an ex parte decree, at least with binding effect upon a sister State.

XVIII

The interlocutory decree of divorce in the State of California is ex parte, interlocutory and not final, and not entitled to full faith and credit; and the plaintiff herein did not personally appear in said action, nor were the children present or domiciled in the State of California at the time of the issuance of said decree, nor was the Buick Station Wagon in the State of California at the time, and said decree had no extraterritorial effect upon either the children or the Buick Station Wagon.

XIX

That the restraining order issued in said case No. 629775 is not res adjudicata, not entitled to full faith and credit, not final and under the law of California was issued by a Court without general or equitable jurisdiction in the proceeding in which it was issued and was not substantially responsive to the special proceeding involved, and is a nullity.

XX

No evidence was offered as to the California law with regard to the interlocutory decree of divorce hereinbefore mentioned and it is assumed that it is the same as the law of Idaho; that the letter written by plaintiff was not an appearance; that the recital in said interlocutory decree that plaintiff appeared is false and not in accordance with the facts; that said decree could not cut off plaintiff's right to the custody of the minor children; that said decree could not determine plaintiff's right to community property in Idaho; that plaintiff did not appear in said proceeding personally or by counsel and was a resident of the State of Idaho at the time of the entering of said decree; that plaintiff was served in said proceeding by substituted service in Idaho; that said interlocutory decree was not based on personal service, nor on any personal appearance and is not final, and was an interlocutory, ex parte and default decree based on substituted service, has no extraterritorial effect and is not res adjudicata and is not entitled to full faith and credit.

XXI

For the protection of the physical and economic well being of the plaintiff and minor children, defendant should be restrained from molesting or interfering with them.

Decree should be entered accordingly.

Dated August 16th, 1954.

D. H. SUTPHEN,
District Judge.

Appendix B

SECTIONS OF IDAHO CODE

9-101. Facts judicially noticed.—Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference. (C.C.P. 1881, § 896; R.S., R.C., & C.L., § 5950; C.S., § 7933; I.C.A., § 16-101).

9-304. Proof of Statutes Act—Publications covered. —Printed books or pamphlets purporting on their face

to be the session or other statutes of any of the United States, or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of this state as prima facie evidence of such statutes.

9-308. Oral evidence of common law — Reports of decisions. — The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, territory or foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory or country, commonly admitted in such courts.

9-307. Certified copies of foreign laws and writings. —Admissibility.—A copy of the written law, or other public writing, of any state, territory or country, attested by the certificate of the officer having charge of the original, under the public seal of the state, territory or country, is admissible as evidence of such law or writing.

Appendix C

IDAHO CODE

13-201. Judgments and orders appealable — Time for taking appeals.—An appeal may be taken to the Supreme Court from a district court:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within ninety days after the entry of such judgment.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; from any special order made after final judgment; and from an interlocutory judgment in action for partition of real property; within sixty days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

Appendix D

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. D 479 839

COMPLAINT TO ESTABLISH FOREIGN JUDGMENT FOR SUPPORT OF MINOR CHILDREN, FOR COSTS AND FOR ATTORNEY'S FEES

GERTRUDE B. RALPHS,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

Plaintiff complains and alleges:

I

That on or about the 1st day of November, 1942, the plaintiff and defendant were married in the State of California; that there are three children the issue of said marriage; namely, ROBERT M. NEWELL, JR., age 10; CHRISTINE LINDSAY NEWELL, age 7; and WILLIAM CHARLES NEWELL, age 6.

II

That at all times herein mentioned the defendant ROBERT M. NEWELL has been and now is a resident of the County of Los Angeles, State of California, and an attorney at law duly licensed to practice and practicing his profession in the State of California.

III

That on the 22nd day of August, 1953, the plaintiff commenced an action for divorce in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, said action being entitled GERTRUDE B. NEWELL, Plaintiff vs. ROBERT M. NEWELL, defendant and bearing No. 6462 in the records and files of said court; that said defendant was duly served with process therein, and on or about the 12th day of September, 1953, appeared in said action and submitted himself personally to the jurisdiction of said court.

IV

That thereafter such proceedings were had in said court and action that on the 31st day of August, 1954, a decree was duly made, entered and docketed in said court, dissolving the bonds of matrimony between this plaintiff and the said defendant and awarding to plaintiff the care, custody, education and control of the said minor children, namely, ROBERT M. NEWELL, JR., CHRISTINE LINDSAY NEWELL and WILLIAM CHARLES NEWELL, and ordering the defendant to pay to plaintiff for the maintenance and support of said minor children the sum of $675.00, payable on or before September 16, 1954, and further an additional sum of $75.00 per month for each of said three children during their minority or until further order of said court, on or before the 1st day of each month, commencing October 1, 1954; and further ordering the defendant to pay to plaintiff as and for

attorney's fees the sum of $500.00, together with costs in the amount of $43.65 in addition to statutory costs taxed in accordance with memorandum of costs in the amount of $182.00; and further ordering the said defendant to pay to plaintiff the sum of $825.00, being the amount of the community property interest of the plaintiff and said defendant in a certain 1953 Buick Stationwagon automobile and which amount was thereupon awarded to plaintiff as her sole and separate property. That a full, true and correct copy of said decree is attached hereto, marked Exhibit "A", pleaded and made a part hereof by reference the same as though set forth herein in full.

V

That no part of said sums ordered paid by defendant to plaintiff have been paid, except that the defendant has paid the sum of $112.50 on account of support for said minor children; that there is now due, owing and unpaid from defendant to plaintiff, under and by virtue of the terms and provisions of said judgment and decree, the total sum of $3,013.15, together with interest thereon at the rate of 7% per annum from the dates said amounts became due as hereinbefore set forth.

VI

That is was necessary for plaintiff to employ and retain counsel to bring this action to enforce payment of said judgment, for child support; that plaintiff has no funds with which to pay her attorney fees and costs of suit herein; that defendant is an able-bodied man

capable of earning and earning sufficient sums to enable him to pay plaintiff's attorney fees and costs of suit herein.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

That said judgment be established as a foreign judgment, and that the same be enforced in this action in the manner provided by law; that it be adjudged and decreed that there is now due and owing to the plaintiff from the defendant the said sum of $3,013.15; together with interest as provided by law; for plaintiff's costs of suit herein; for reasonable attorney's fees, and for such other and further relief as to the Court may seem meet and proper in the premises.

GLENN A. LANE,
Attorney for Plaintiff.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

GLENN A. LANE, being first duly sworn says that he is an attorney at law admitted to practice before all courts of the State of California and has his office in Los Angeles, Los Angeles County, California, and is the attorney for plaintiff in the above entitled action; that plaintiff is unable to make the verification because she is absent from said county and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are herein

stated on information or belief; and as to those matters he believes it to be true.

GLENN A. LANE,

Subscribed and sworn to before me this 4th day of January, 1955.

MARJORIE E. OAKLEY,
Notary Public in and for said County and State.

Appendix E

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. D-479839

TEMPORARY ORDER FOR CUSTODY AND SUPPORT OF MINOR CHILDREN

GERTRUDE B. RALPHS,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

The above-entitled matter having come on regularly for hearing on the 8th day of March, 1955, before the Honorable Kurtz Kauffman, Judge presiding, in Department Pasadena "B", on Order to Show Cause issued pursuant to plaintiff's Application for Temporary Order for support of minor children and for attorney's fees and court costs pending trial of the within action; plaintiff appearing in person and by her attorney, Glenn A Lane, Esq., and defendant appearing in person and by his attorney, Ernest J. Zack, Esq., and the parties hereto and their respective counsel having stipulated in open court that the within matter might be consolidated for hearing with that certain case, between the same parties, in the above-entitled court, entitled "Robert M. Newell, Plaintiff, vs. Gertrude B. Newell, Defendant," bearing number Pasadena D-11260, in the records and files of the above-

entitled court; and said cases having been duly consolidated for hearing, by order of Court; and evidence, both oral and documentary, having been introduced; and counsel having argued said matters and said matters having been duly submitted to the Court for its decision; and the Court being fully advised in the premises hereby finds that both plaintiff and defendant are residents of the County of Los Angeles, State of California; that ever since the 8th day of February, 1955, the three minor children of the parties hereto, namely, Robert M. Newell, Jr., Christine Lindsay Newell and William Charles Newell, have been and now are residing with and in the physical custody of defendant, father, in the City of San Marino, County of Los Angeles, State of California; and that the plaintiff and defendant are each fit and proper persons to have the custody and control of the minor children of the parties hereto; and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff and defendant are each fit and proper persons to have the custody and control of the minor children of the parties hereto; and said three minor children of the parties hereto, namely, Robert M. Newell, Jr., Christine Lindsay Newell and William Charles Newell, are hereby placed under the joint legal custody of the parties hereto with physical custody at times in the plaintiff and at other times in the defendant, as follows:

Physical custody of said minor children shall remain with defendant until the middle of the Easter vacation of this year, to-wit, Wednesday, the 6th day of April,

1955, at which time physical custody shall be and remain with the plaintiff, except as hereinafter provided. During the summer vacation period each year, the physical custody of said minor children shall be, and is hereby, divided equally between the parties hereto; the first half of each said summer vacation, the physical custody of said minor children shall be and is with the plaintiff, mother, and the second half of such summer vacation shall be and is with the defendant, father. Each party shall share equally the other vacation periods and holidays not herein specifically provided for; that is, during each and all of the other vacation periods and holidays not herein specifically provided for, the physical custody of said minor children shall be divided equally between the parties hereto.

At the beginning of the fall school term each year, the physical custody shall be with, and is hereby granted to, the mother. Each party shall have the right of reasonable visitation of the children when they are in the physical custody of the other party.

When the plaintiff, mother, has physical custody of said minor children, the defendant shall pay, and is hereby ordered to pay, to the plaintiff, mother, for the support and maintenance of each of the said three minor children, the sum of Seventy-five Dollars ($75.00) per month, payable in advance, on the 1st day of each calendar month in which the plaintiff, mother, is granted the physical custody of said minor children; excepting only, that for and during the calendar months wherein the plaintiff, mother, shall be entitled to the physical custody of the said minor children dur-

ing only a portion of such calendar month, the defendant shall pay, and is hereby ordered to pay, proportionately for the support of said minor children, as follows: The defendant shall pay to the plaintiff, mother, on the 1st day of each such calendar month, such portion of said sum of $75.00 for each said child as the ratio of the number of days of said month during which she is entitled to the physical custody of each child, bears to 30; in other words, defendant shall pay to plaintiff proportionately on the basis of $75.00 per month for each child for such portion of the calendar month as the mother shall be entitled to the physical custody of each said minor child. Support payments shall be suspended during the period when the defendant is entitled to the physical custody of said minor children. The within order for support and maintenance of said minor children shall remain in effect until further order of the Court.

Plaintiff's application for temporary attorney's fees and costs is denied for the reason that plaintiff has not shown any need therefor.

Dated: March 16, 1955.

KURTZ KAUFFMAN,
JUDGE OF THE SUPERIOR COURT.

The clerk is ordered to enter this order.

Appendix F

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

Case No.————

ORDER OF CONTEMPT

The matter of the Court's order to the Defendant, Robert M. Newell, heretofore issued herein, directing him to appear and show cause, if any he has, why he should not be punished for contempt of this Court for the violation of the order heretofore made herein on January 15, 1954, granting him certain possessory rights in a 1953 Buick Station Wagon, and why he should not be directed and ordered to surrender said Station Wagon as in said order provided, came on regularly to be heard on July 12, 1954, said Robert M. Newell being personally present in Court and also represented by John A. Carver, Jr. as counsel, and oral and documentary evidence having been introduced, and the matter having been submitted to the Court and the Court being fully advised in the premises, finds and decides:

That the Plaintiff herein brought said Buick Station Wagon into Idaho on or before July 7, 1953, and that said Station Wagon continued in her possession and in Idaho up until the time that Defendant drove said car from Idaho to California pursuant to said order of January 15, 1954.

That on Jnauary 15, 1954, upon the Court granting said Defendant the privilege of addressing the Court, said Defendant made a personal plea for the use of said Station Wagon, and in part, represented to the Court as follows:

> "I would like to have one car to use in my work in Los Angeles, and the car I would want it to still be subject to the jurisdiction of this Court, the rights in the car, whether the Court follows the California judgment or not. I have generally appeared in Idaho, the car will be before the Court to decide. All I want to do is to use it during the windup of this affair unless the Court follows the judgment and awards it to me exclusively. I need it in my business particularly because there is no public transportation from where I live. I teach law school two nights a week and have to be downtown in Los Angeles."

That said Defendant deceived the Court in that sometime prior to January 15, 1954, to induce the Bank of California to loan him money on the security of said Station Wagon, said Defendant represented that the car was temporarily out of the State and that he would have it back in two or three weeks.

That in said order of January 15, 1954, which order was entered at the request of said Defendant, this Court made the following provisions:

> "IT IS FURTHER ORDERED That the ruling of the Court upon defendant's motion for the awarding of the 1953 Buick Station Wagon be and hereby is reserved, but that defendant may have possession of the same, pending further order of this Court, provided,
>
> "AND IT IS FURTHER ORDERED That the Court does not determine the rights of the respective parties hereto in and to said Station Wagon, but reserves jurisdiction for such purpose and that defendant's right to possession is only until further order of this Court, and
>
> "IT IS FURTHER ORDERED That defendant be and hereby is directed and ordered to surrender said Station Wagon to the plaintiff or to the custody of the Court, upon Notice by the Clerk of the Court; and plaintiff is hereby ordered and directed to surrender said Station Wagon to said defendant under the terms and provisions of this order upon payment by defendant to said plaintiff of the $300.00 attorneys fees and suit money hereinbefore mentioned."

That said Defendant not only transferred the legal title to said Station Wagon in California as security, but traded the same upon a new Buick car and received in said trade in addition to such new car the sum of

$500.00, and in connection with said trade, said car was sold to a third person in excess of $3,200.00.

That the interlocutory ex-parte default decree entered by the Superior Court of Los Angeles County, California, under date of September 25, 1953, had no extraterritorial effect, and said Buick Station Wagon was not in the State of California at the time of the entering of such decree; and in any event, said Defendant has subjected himself to the jurisdiction of this Court, and particularly with reference to said Buick Station Wagon, regardless of said California decree.

That said Defendant by the sale of said Station Wagon has made it impossible to return the same to Idaho, but he contends that he should have notice and an opportunity to return the same.

That said Defendant has not accounted to the Plaintiff for her separate property which was traded in upon said Buick Station Wagon in the form of two cars which were her separate property, but this Court has no jurisdiction to make any order with reference to such separate property; however, the Court does determine that the community interest in said Buick Station Wagon amounts to $825.00, which the Court by decree herein will provide to be awarded to Plaintiff; that said Station Wagon should either be returned in order to effectuate such award, or the value of said community interest should be paid by Defendant to Plaintiff.

That Defendant is in contempt of this Court, and

in the event he does not purge himself as hereinafter provided, should be punished.

NOW, THEREFORE, IT IS HEREBY ORDERED That said Defendant, Robert M. Newell, be and hereby is adjudged guilty of contempt of this Court; and

IT IS FURTHER ORDERED That said Defendant may purge himself of said contempt if, within thirty (30) days from the date of this order, said Defendant either returns said Station Wagon to the custody of this Court, or pays to Plaintiff the sum of $825.00; and

IT IS FURTHER ORDERED That if said car is not returned or if said payment be not so made, said Defendant shall appear before this Court on the 31st day following the date of this order, or at such other time as the Court may fix, for sentence and pronouncement of judgment for such contempt.

DATED: August 31st, 1954.

D. H. SUTPHEN, District Judge

Appendix G

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. 629495

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

AFFIDAVIT IN SUPPORT OF ISSUANCE OF SUBPOENA RE DEPOSITION PURSUANT CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 2037

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

ROBERT M. NEWELL, being sworn deposes and says:

The above entitled action is an action for divorce filed by plaintiff, GERTRUDE B. NEWELL, against affiant in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, on the 21st day of August, 1953. Subsequently thereto affiant filed his answer to said complaint and said action is now pending before that court.

Affiant desires to take the testimony of the following witnesses by deposition:

(1) Victoria Schaffauser

(2) William A. Duvoisin

(3) Walter W. Ralphs, Jr.

The testimony of each of the above witnesses is material to affiant's defense in said action in that some of the issues, among others, are:

(1) The alleged adultery of plaintiff during the course of their marriage;

(2) Custody of the minor children of the parties;

(3) That plaintiff treated affiant with extreme cruelty during the course of their marriage.

Each of the above named witnesses will testify to facts material to these issues. Each resides in the County of Los Angeles, State of California.

A commission to take the testimony of said witnesses or any of them has not been issued. According to the law of the State of Idaho, where said action is pending, depositions of a witness or witnesses taken pursuant to California Civil Procedure Section 2037, will be received in said action.

Idaho Code Section 9-901 provides:

"Deposition of witnesses taken within or without the State may be taken according to the regulations provided before any judge, justice of peace, notary public, clerk or a court of record or commissioner appointed by court to take depositions . . ."

Idaho Code Section 9-905 provides:

"In all actions it may order the taking of depositions whenever deemed necessary to determine the rights of the parties or to expedite the trial of causes and may, if necessary, for that purpose, order a continuance until next term."

Idaho Code Section 9-916 provides:

"When a deposition is to be taken within or without the State but within the United States, no commission shall be necessary for taking the deposition . . . When taken out of the United States the Clerk shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner taking the deposition. No order of the Court or affidavit shall be necessary to authorize the issuing of the Commission.

Idaho Code Section 9-928 provides:

The provisions for taking of a deposition within the State where no commission has been issued are substantially the same as California C.C.P. Section 2037.

WHEREFORE, affiant prays:

(1) That subpœna re deposition issue requiring said Victoria Schaffauser, William A. Duvoisin and Walter W. Ralphs, Jr., to appear and testify before a judge of the above entitled court, a commissioner thereof, or any other officer or person designated by a Judge of the Superior Court, at a time and place specified in said subpœna.

ROBERT M. NEWELL

Subscribed and sworn to before me this 3rd day of June, 1954.

THEODORE A. CHESTER,
Notary Public in and for said County and State.

Appendix H

ADVANCE CALIFORNIA REPORTS
Cases Determined in the Supreme Court
Published Weekly by
The Recorder Printing and Publishing Co.
(L. A. No. 23337. In Bank. Aug. 3, 1956)

GERTRUDE B. NEWELL,

Appellant,

vs.

ROBERT M. NEWELL,

Respondent

(On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 20574 (136 A.C.A. 792, 289 P. (2d) 32) affirming an order of the superior court. Appeal dismissed.)

(1) Appeal—Moot Questions.—The issues involved on appeal from an order of the superior court which restrained plaintiff from prosecuting a divorce action in another state, from taking depositions of persons for use in such action, and from taking steps in a court in any state, other than the California court, leading to a determination of the rights of minor children of the parties became moot, necessitating dismissal of the appeal, where it appeared from the briefs of the parties that plaintiff received a divorce decree in the other state which was affirmed by the Supreme Court of that state, that there was no action pending in that state in which depositions of California witnesses would be needed, and that custody orders were made by a Cali-

fornia superior court, superseding the custody order which was the subject of appeal, in which custody was awarded jointly to the parties.

APPEAL from an order of the superior Court of Los Angeles County restraining plaintiff from prosecuting a divorce action in another state, from taking depositions for use in such action, and from taking any steps in a court in any state, other than the California court, leading to a determination of the rights of custody of minor children of the parties. Elmer D. Doyle, Judge. Appeal dismissed.

Ernest W. Pitney and Glenn A. Lane for Appellant.

Theodore A. Chester for Respondent.

(1) See Cal. Jur. 2d, Appeal and Error, §533.

McK. Dig. Reference: (1) Appeal and Error, §18.

THE COURT. — Plaintiff, Gertrude B. Newell, appeals from an order of the Superior Court of Los Angeles County, made on June 23, 1953, which restrained her from prosecuting an action for divorce in Idaho against Robert Newell; from taking depositions of certain named persons or of any other persons for use in such Idaho divorce action; and from taking any steps in any court in any state, other than the California court, leading to a determination of the rights of custody of the minor children of the parties.

Before this case was placed upon our calendar for oral argument, we propounded four questions to counsel for the respective parties in an endeavor to ascertain whether or not the issues involved on this appeal had become moot. In response to the questions

propounded, briefs were filed by counsel for the respective parties.

(1) The briefs filed by the parties in answer to our questions show that Gertrude, plaintiff and appellant here, *received an Idaho decree of divorce on August 31, 1954, which was affirmed by the Supreme Court of Idaho on February 27, 1956. It follows, therefore, that the provisions of the restraining order prohibiting her from seeking a decree of divorce in Idaho are no longer an issue.* It also appears that there is no action pending in Idaho in which depositions of California witnesses would be needed. In answer to our question concerning the order presently in effect concerning the custody of the minor children of the parties, we are advised that on March 16, 1955, two identical custody orders were made by the Superior Court of Los Angeles County in which legal custody was awarded jointly to the parties. These two orders supersede the custody provision of the order which is the subject of this appeal. There are appeals presently pending in the District Court of Appeal from the orders of March 16, 1955.

We conclude, therefore, that there is no issue involved in this appeal which requires a determination by this court.

The appeal is dismissed.

McComb, J., did not participate herein.

Appendix I

IN DEPARTMENT 8 OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

GERTRUDE B. NEWELL,

Plaintiff

vs.

ROBERT M. NEWELL,

Defendant

Case Number 629775

DEFENDANT'S ORDER TO SHOW CAUSE RE RESTRAINING ORDER

MOTION OF DEFENDANT TO QUASH SUBPOENAE AND SUBPOENAE DUCES TECUM

HONORABLE ELMER D. DOYLE, JUDGE.

AFTER ORAL ARGUMENT, The motion of defendant to quash subpœnæ and subpœnæ duces tecum is granted; and plaintiff is restrained from taking depositions in this County to be used in the Idaho proceedings.

(Filed June 22, 1954. HAROLD J. OSTLY, County Clerk, by W. R. Turner, Deputy.)

W. H. BRANNERS, and E. W. PITNEY, Counsel for Plaintiff.

NEWELL and T. A. CHESTER, Counsel for the Defendant.

Appendix J

32-601 IDAHO CODE

DISSOLUTION OF MARRIAGE

Marriage is dissolved only:

(1) By the death of one of the parties; or,

(2) By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.